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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

IN RE: SEALED WARRANT
AFFIDAVITS FOR THE SEARCH OF
1372 BABBLING COURT, MESQUITE,
NEVADA AND ANY OTHER SEARCH
WARRANTS CONNECTED TO
STEPHEN A. PADDOCK OR THE
CRIMES COMMITTED OCTOBER 1,
2017 AT THE ROUTE 91 HARVEST
COUNTRY MUSIC FESTIVAL

2:17-cv-02775-JAD-PAL

Government's Response to the
Petitioner's Motion to Unseal
(ECF No. 1)

The United States of America, by and through its attorneys, DAYLE ELIESON, United States Attorney, District of Nevada, and Cristina D. Silva, Patrick Burns, Nicholas Dickinson, and Andrew W. Duncan, Assistant United States Attorneys, hereby files this response to Plaintiff's petition to unseal (hereinafter "the Petition").

POINTS AND AUTHORITIES

I. Summary of the Response

Plaintiffs move this Court to unseal the affidavits of probable cause in support of one or more warrants issued by the United States District Court to search 1372 Babbling Brook Court in Mesquite, Nevada, and any other locations connected with the investigation into Stephen A. Paddock and mass shooting that occurred on October 1, 2017 in Las Vegas, Nevada.¹ With limited exception, the United States does not object to unsealing the documents specifically requested in the Petition. As a result, the United States respectfully requests that the Court grant the petitioners motion *in part*. The United States does seek to have certain, limited information redacted and/or maintained under seal.

II. Legal Standard

The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.” The specific statutory rules for obtaining a search warrant are contained in Federal Rule of Criminal Procedure 41, which requires a law enforcement officer to present an affidavit to the court in support of any warrant.² Once the court receives such an affidavit and issues a search warrant, it has the “inherent power” to place the affidavit under seal.³ The Ninth Circuit has held that the public’s

¹ See ECF No. 1 at 4.

² Fed. R. Crim. P. 41(d)(2).

³ *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213, fn.3 (9th Cir. 1989) (citing *Matter of Sealed Affidavit(s) to Search Warrants Executed on Feb. 14, 1979*, 600 F.2d 1256, 1258 (9th Cir. 1979)); see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598, (1978) (“Every court has supervisory power over its own records and files”).

1 right of access to judicial documents “is not absolute and can be overridden given
2 sufficiently compelling reasons for doing so.”⁴

3 Once a search warrant affidavit has been placed under seal, Courts must analyze
4 two distinct interests in gaining access to the materials: (1) whether the place and process
5 have historically been open to the press and general public; and (2) whether “public access
6 plays a significant positive role in the functioning of the particular process in question.”⁵
7 The Ninth Circuit, and some sister Courts, has also recognized a limited common law right
8 of access to judicial documents, however, the Court has not extended that right to search
9 warrant materials in a pre-indictment context.⁶ The Ninth Circuit has also held that
10 because search warrant proceedings were not traditionally open, “members of the public
11 have no First Amendment right” to access sealed search warrant affidavits during the
12 pendency of an investigation.⁷ Several District Court cases reached a different conclusion,
13 acknowledging a limited right to access.⁸

15 While there is no uniformity as to the precise Constitutional rights that apply to
16 sealed search warrants, the United States is unaware of any authority recognizing an
17

18 ⁴ *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).

19 ⁵ *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (“*Press–Enterprise II*”).

20 ⁶ See generally, *id.* at 1219; see also *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir.
21 1989) (holding the press does not have a First Amendment right to access a search warrant
22 affidavit); *In re Search of Fair Fin.*, 692 F.3d 424, 433 (6th Cir. 2012) (“We conclude there is no First
23 Amendment right of access to documents filed in search warrant proceedings”); *Matter of EyeCare
24 Physicians of Am.*, 100 F.3d 514 (7th Cir. 1996) (same); but see *In re Search Warrant for Secretarial
Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (opposite).

⁷ *Times Mirror Co.*, 873 F.2d 1218.

⁸ See *Matter of Up N. Plastics, Inc.*, 940 F.Supp. 229, 232 (D.Minn. 1996) (a person
whose property has been seized pursuant to a search warrant has a right to inspect and copy the
search warrant affidavit); *In re Search of 8420 Ocean Gateway Easton, Maryland*, 353 F.Supp.2d
577, 579 (D.Md. 2004) (same).

1 *absolute* right to access. Instead, the decisions agree that District Courts retain a great
2 deal of discretion in making individualized determinations as to what should be sealed.⁹

3 ***III. Argument***

4 After considering and balancing the two interests regarding the sealed search
5 warrants, the United States respectfully requests that the Court grant, *in part*, the specific
6 relief the petitioners desire; that is “to unseal the affidavit(s) of probable cause in support
7 of one or more warrants issued by the Court and authorizing agents of the Federal Bureau
8 of Investigation (FBI) to search the premises located at 1372 Babbling Brook Court,
9 Mesquite, Nevada and any other locations connected with the investigation of Stephen
10 Paddock and/or the crimes committed on October 1, 2017 against people attending the
11 Route 91 Harvest Country Music Festival in Las Vegas....”¹⁰ In order to facilitate the
12 unsealing of the warrants and affidavits requested in the Petition, the United States has
13 prepared an exhibit with all of the warrants and affidavits, which will be filed unsealed
14 contemporaneous to the file of this response. The prepared exhibit will be redacted, and
15 the one exhibit the United States seeks to keep sealed will be not included.

17 The United States asks that the Petition be granted only in part because it
18

19 ⁹ See *e.g. Nixon*, 435 U.S. at 599 (“decision as to access [to judicial records and
20 documents] is one best left to the sound discretion of the trial court.”); *Goetz*, 886 F.2d at 65 (“the
21 common law qualified right of access to the warrant papers is committed to the sound discretion of
22 the judicial officer who issued the warrant”); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir.
23 1987) (holding the district court enjoys broad discretion in exercising its supervisory power to seal
24 documents); *In re Nat’l Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981) (the right of access must be
reconciled with legitimate countervailing public or private interests, therefore the decision about
what should be sealed rests in the sound discretion of the trial court.); see also *Siedle v. Putnam
Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (“The trial court enjoys considerable leeway in making
decisions of this sort.”).

¹⁰ ECF No. 1 at 4.

1 respectfully requests that very limited information be redacted from one warrant,¹¹ and
2 that an exhibit to the same warrant remain under seal. The United States requests that
3 the information be redacted and remain sealed because it is the subject of pending state
4 court litigation. The exhibit at issue remains sealed in the Clark County District Court.
5 The United States respectfully requests that that litigation be resolved prior to the United
6 States further examining the exhibit to determine if it should be unsealed in accordance
7 with the Petition. The United States will provide a copy of the warrant (with the sealed
8 exhibit), and an unredacted version of the affidavit for *in camera* review.
9

10 CONCLUSION

11 For the reasons set forth herein, the United States respectfully requests the Court
12 grant the specific request included in petitioners' motion *in part*, and thereafter unseal
13 the sealed exhibit accompanying this response to facilitate the relief sought in the
14 Petition.

15 Dated this 6th day of January, 2018.

16 Respectfully Submitted,

17 DAYLE ELIESON
18 United States Attorney

19 //s//

20 CRISTINA D. SILVA
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23 ANDREW W. DUNCAN
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¹¹ The United States notes that Paddock's date of birth is redacted from a second warrant pursuant to the local rules. *See* LR IC 6-1(3).

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served counsel for the Petitioners a copy of the foregoing by means of electronic filing.

DATE: January 5, 2018.

/s/ Cristina D. Silva
CRISTINA D. SILVA
Assistant United States Attorney